# What Does the NLRB Have to Do with Healthcare Providers?



*By Ron Hedges*

As a presenter at this year's AHIMA Annual Convention and Exhibit, I covered many topics. While I plan to post about others in subsequent posts, this month I want to discuss a subject that many healthcare providers and their staff members might find unfamiliar: the National Labor Relations Board (NLRB). Specifically, how does the NLRB regulate policies of healthcare providers?

A little background: The NLRB was created in the 1930s pursuant to the National Labor Relations Act (Act). Section 7 of the Act does the following:

> "Guarantees employees 'the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,' as well as the right 'to refrain from any or all such activities.'"
> *Source: https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1*

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." For example, according to the Act, an employer cannot:

> "[t]hreaten employees with adverse consequences if they engage in protected, concerted activity. (Activity is "concerted" if it is engaged in with or on the authority of other employees, not solely by and on behalf of the employee himself. It includes circumstances where a single employee seeks to initiate, induce, or prepare for group action, as well as where an employee brings a group complaint to the attention of management. Activity is 'protected' if it concerns employees' interests as employees. An employee engaged in otherwise protected, concerted activity may lose the Act's protection through misconduct."
> *Source: https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1*

Under the Act, the NLRB will examine a challenged policy of an employer to:

> "determine whether it explicitly restricts Section 7 activity. If it does, the rule is unlawful. If the rule does not explicitly restrict Section 7 activity, the rule must be evaluated to determine whether: (1) the rule was promulgated in response to union activity; (2) the rule has been applied to restrict the exercise of Section 7 rights; or (3) employees would reasonably construe the language in the rule to prohibit Section 7 activity. The Board must give the rule a reasonable reading and refrain from reading particular phrases in isolation or presume improper interference with employee rights. However, 'where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it.'"
> Source: *Valley Health System LLC d/b/a Spring Valley Hospital Medical Center, etc.,* 363 NLRB No. 178 (2016) (footnotes omitted).

With this background, we can use the facts of *Valley Health System* to provide a real-life example of what the NLRB can do.

*Valley Health System* maintained a rule in an employee handbook that stated, among other things:

> "Certain rules and regulations regarding employee behavior are necessary for the efficient operation of the System and the Facility and for the benefit and protection of the rights and safety of all. Conduct that interferes with System or Facility operations, brings discredit on the System or Facility, or is offensive to patients or fellow employees will not be tolerated."

The NLRB's General Counsel challenged the rule, contending that it violated Section 8(a)(1) of the Act. The Board concluded that the healthcare provider violated the Act by "maintaining a rule that prohibits conduct that is 'offensive' to fellow employees." The Board reasoned:

> "The rule's restriction on conduct that is 'offensive' to fellow employees appears in the same sentence as, and immediately follows, the prohibition on conduct that 'brings discredit on the System or Facility,' which the judge found, and we agree, is unlawfully overbroad. This sequence makes it more likely that a reader would reasonably interpret the rule to target workplace discussions of terms and conditions of employment that—while potentially bringing 'discredit' on the Respondent or otherwise being subjectively 'offensive' to fellow employees—clearly fall within the ambit of the Act's protections. To be sure, the rule also contains introductory language setting forth an intention to promote 'efficient operation' and protect 'the rights and safety of all.' But this language does little to cure its ambiguity or overbreadth. These references do not provide sufficient context for an employee to determine what types of 'offensive' comments or behaviors the rule is targeting, or how the rule would or would not be applied in the context of Section 7 activity (which often involves controversy, blunt criticisms, and disagreements that may well be deemed 'offensive' by management or fellow employees). As a result, employees would likely refrain from engaging in certain Section 7 activity due to a reasonable concern that their conduct could be perceived as running afoul of the rule. [footnote omitted]."

What does *Valley Health System* teach? First, employer policies intended to restrict protected activities of their employees are subject to challenge by the NLRB. Second, policies that explicitly restrict protected activities are prohibited, as are policies that employees would "reasonably construe" to prohibit protected activities. Moreover, policies may be challenged in response to disciplinary action taken by employees (for example, when using social media) or in response to a general challenge to a policy. Healthcare providers subject to regulation by the NLRB might look to their policies with these considerations in mind.

Next month's post will look at another agency, the Federal Trade Commission.

***Editor's note: The views expressed in this column are those of the author alone and should not be interpreted otherwise or as advice.*

*Ron Hedges, JD, is a former US Magistrate Judge in the District of New Jersey and is currently a writer, lecturer, and consultant on topics related to electronic information. He is a Senior Counsel with Dentons US LLC*

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